**MULTNOMAH COUNTY**
LAND USE AND TRANSPORTATION PROGRAM
1600 SE 190TH Avenue Portland, OR 97233
PH: 503-988-3043 FAX: 503-988-3389
http://www.co.multnomah.or.us/dbcs/LUT/land_use

# DECISION OF HEARINGS OFFICER

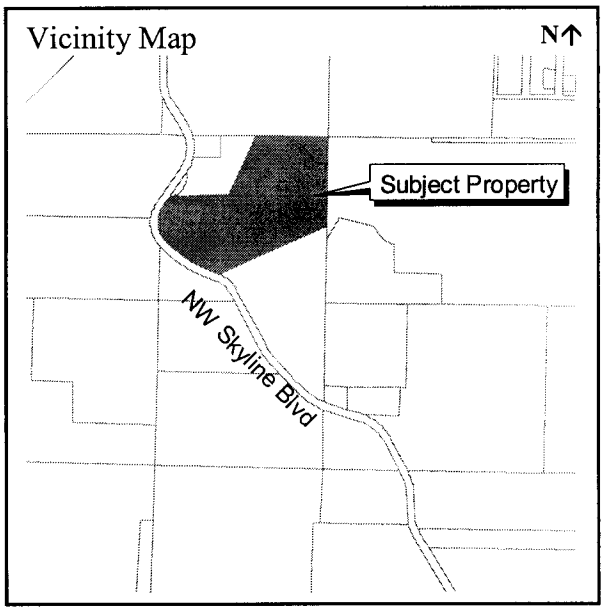
**Case File:** T2-04-105

**Permit:** Planning Director's Determination

**Location:** 14180 NW Skyline Boulevard
TL 2100, Sec 25, T2N, R2W, W.M.
Tax Account #R64970-2540

**Applicant:** Drew Bledsoe
C/O Cofield Law Office
4228 Galewood, Suite 18
Lake Oswego, OR 97035

**Owner:** Drew Bledsoe
1325 SE Sunnymead
Pullman, WA 99163




**Summary:** This is an appeal by the applicant for a Planning Director's determination of the director's decision that (1) the zoning clearance for a dwelling on the subject property had expired on January 1, 2003, pursuant to MCC 37.0750; and (2) the farm management plan for the subject property has not been implemented as required by Board of Commissioners Order No. 00-022. The subject property is zoned Exclusive Farm Use.

**Decision:** The Planning Director's decision is reversed. The zoning clearance for a dwelling issued under BOC Order No. 00-022 has not expired, and substantial evidence in the record demonstrates that the farm management plan for the subject property is being implemented as required. The applicant is entitled to zoning approval and sign-off on a building permit review request, based upon the applicant's submittals and statements in the record, and subject to the conditions of approval that follow.

# I. IMPARTIALITY OF HEARINGS OFFICER.

## A. No *ex Parte* Contacts.

MCC 37.0780 states rules that govern challenges to a hearings officer's participation in an appeal. Subsection A requires disclosure and an opportunity for any interested party to rebut material factual information obtained by the hearings officer outside the public hearing. I stated at the hearing that I had made no site visit, and had not had any other *ex parte* contacts regarding the merits of this appeal. When asked, no person at the hearing expressed an interest in asserting otherwise, or objected to my hearing the appeal on these grounds.

## B. No Conflict of Interest.

MCC 37.0780(B) prohibits participation in deliberations and decision making if the "decision maker, or any member of a decision maker's family or household, has a financial interest in the outcome of a particular *** matter." I stated at the hearing that neither I nor any family or household member had any financial interest in the outcome of this appeal, and therefore I had no conflict of interest in hearing it. I inquired whether any present objected, and no person did.

## C. No Bias.

Subsection C of MCC 37.0780 provides in relevant part as follows:

> "Bias. All decisions in quasi-judicial matters shall be fair, impartial and based upon the applicable approval standards and the evidence in the record. Any decision maker who is unable to render a decision on this basis in any particular matter shall refrain from participating in the deliberation or decision on that matter."

On April 7, 2005, the day before the public hearing in this matter, I was informed by county planning staff that Jeff Bachrach, attorney representing Western States Development Corporation (Western States) participating as hearings officer in the appeal. Western States is a prior owner of the real property that is the subject of this appeal. A number of e-mail messages regarding his objections that had circulated between Mr. Bachrach, Ms. Cofield, County Counsel Sandra Duffy, and Planner Derrick Tokos were forwarded to me. At that point, I had read and reviewed the materials in the record of the appeal, and had ascertained that I had no conflict of interest and no "bias," as that term is described in MCC 37.0780( C).

Mr. Bachrach was concerned that it would be inappropriate for me to hear the case, and stated the following three reasons for objecting to my participation: (1) Western States and certain clients of mine are adverse to each other in a pending matter; (2) In past land use proceedings involving this subject property, I had represented clients who were adverse to Western States; (3) Multnomah County Hearings Officer Joan Chambers should hear the appeal. Hearings Officer Chambers had been the decision maker in prior

proceedings involving this parcel, and had heard and would decide an appeal on very similar issues concerning another parcel that had been owned by Western States, and that had also received a dwelling approval in 1989. I will address each of these objections.

It is true that I represent petitioners, while Mr. Bachrach represents intervenor-respondents, in a judicial review currently pending before the Court of Appeals. *City of West Linn v. Land Conservation and Development Commission (LCDC)*, CA 122169. The court heard oral argument in *City of West Linn* on February 7, 2005, and a decision is pending. The subject of this review is the approval by LCDC in July 2003 of Metro's December 2002 expansion of its urban growth boundary to include a number of study areas that had formerly been outside the boundary. My clients briefed and argued that LCDC and Metro had erred in approving the expansion to include a particular area, and made no general arguments concerning the validity of the entire expansion. Mr. Bachrach's clients defended LCDC and Metro in expanding the UGB to encompass entirely different areas, actions that were challenged by a petitioner whom I do not represent. Mr. Bachrach's clients' interests relate to areas about which my clients took no position before either LCDC or the Court of Appeals. There have been no disputes on the merits of the review between Mr. Bachrach's clients and mine.

Additionally, as noted above, the issues in *City of West Linn* have nothing to do with the matter at hand in this proceeding. The outcome of that case, were it to be decided today, would have no effect on issues related to this appeal. Likewise, the outcome in this appeal cannot possibly affect any financial interests of mine that are related to *City of West Linn*. Mr. Bachrach is therefore mistaken in alleging that I have a conflict of interest by virtue of our clients' adversity in that pending review.

My clients' positions in *City of West Linn* also does not affect my ability to hear and decide this case fairly, impartially, and based upon the evidence in the record. The group of attorneys who practice Oregon land use law in Multnomah County is relatively small, and most of us have worked with or against many of the rest of us at one time or another. That does not automatically disqualify me from hearing a case when I have had prior, unrelated dealings with counsel for one of the participants. The question is whether I can hear, consider, and decide the case without bias. In this case, I believe that I can do so..

It should also be noted that Western States is not a party to this appeal, and that Mr. Bachrach did not attend the public hearing to clarify or defend his objections.

Mr. Bachrach also alleges that I have represented clients adverse to Western States in some phase of the many prior proceedings regarding the subject property in this appeal. That allegation is simply incorrect. Hearing this appeal is my first legal work involving this property.

One of my clients in *City of West Linn* is Arnold Rochlin. In the past, and in proceedings concerning the subject property in this appeal, Mr. Rochlin was directly adverse to Western States before the county, LUBA and the Court of Appeals. Mr. Rochlin has not participated at all in the current proceedings. I have not communicated with Mr. Rochlin since learning that I would hear this appeal; we have not discussed this appeal, or the

subject property, or any issues related to the FMP or the dwelling approval. I do not know whether he is aware of the current proceedings, or has an opinion on the merits of these proceedings, or if he does, what his opinion is. My representation of Mr. Rochlin in *City of West Linn* has created no conflict of interest regarding this matter, and it has no effect on my ability to hear and decide this case without bias.

Mr. Bachrach would prefer that Hearings Officer Chambers, who has had long experience with land use proceedings involving the subject property, and who has heard a similar appeal, be assigned to this case. Case assignment is not a matter within my control, unless I choose to disqualify myself from deciding a case pursuant to MCC 37.0780. Both Mr. Bachrach and Ms. Cofield expressed concern that my decision should be consistent with that of Ms. Chambers in Case File No. T2-04-089, issued May 12, 2005. That decision has been available to me, and I am familiar with its analysis and conclusions. That a participant might prefer a different hearings officer, or hope to receive a decision identical to another, is not grounds for recusal.

### D. No other objections.

After discussing the matters above at the hearing, I inquired of all the persons in attendance at the public hearing, and specifically of Ms. Cofield, whether anyone would object if I heard this case. An e-mail in the record dated April 7, 2005, from Ms. Cofield to the county expresses agreement with Mr. Bachrach's objections, but she did not maintain that position at the hearing. In answer to my question, Ms. Cofield responded that she did not have any objection to my participating in this appeal as hearings officer. No other person stated any objection or concerns.

### E. Conclusion.

Mr. Bachrach's objections on behalf of Western States were not well taken. The parties who expended their resources to prepare for the public hearing had a legitimate interest in having the case heard on that day, and in receiving a decision as soon thereafter as possible. It would have been both unnecessary under the code and extremely wasteful to have recused myself on the day of the hearing. I have heard the appeal, and will decide it.

## II. ANALYSIS AND FINDINGS OF FACT.

### A. Procedural History.

The facts are set out in great detail in the applicant's materials and the planning director's decision. Not all will be repeated here.

In 1989, Western States, as owner of the subject parcel, obtained approval PRE 23-89 that permitted development of a dwelling in conjunction with farm use of the property. A condition of the approval, as required by state law and the county code then in effect, was that the dwelling was to be related to the farm's operation, as described in a farm management plan (FMP) that was approved by the county. Western States did not immediately implement the FMP.

The FMP called for establishment of a Christmas tree farm on 4.5 acres of the property. It detailed the general tasks necessary each year over a 10-year period to plant, culture, and harvest Christmas trees, after which all of the trees planted according to the plan would have been harvested and sold. Under the heading "Objectives in managing this land for farm purposes," the FMP states: "The objective is to create a commercially viable Noble fir Christmas tree farm on each of three parcels [including the subject parcel]."

Construction of the dwelling was to occur fairly early in the 10-year period to enable necessary and less costly farm management. With regard to the dwelling, the FMP states: "It is anticipated that the work load necessary to properly manage the farm, and the cost involved, would necessitate a manager living on the property by the third year of the management program."

In 1993, the Oregon legislature significantly amended the law pertaining to establishment of dwellings on farmland. The dwelling in conjunction with farm use and pursuant to a farm management plan was eliminated. In 1997, the county followed suit. Law now applicable to the subject property would instead apply a farm income test for purposes of demonstrating whether the land was in farm use.

In 1999, Western States applied to the county in MC 10-99 for a "zoning clearance" for the subject site. The zoning clearance would state that the property in question had received the land use approval necessary before the City of Portland could issue a building permit. County staff took the position that the FMP had not been implemented, and that the dwelling approval had expired.

The Hearings Officer found that the FMP was being implemented. The appropriate number of trees had been planted on the site, and were growing. In January 2000, the Hearings Officer concluded that the Christmas tree farm implementation had progressed to the beginning of the third year on the FMP's schedule. The Hearings Officer also imposed a condition:

> "The applicant must continue to follow the farm plan applicable hereto, in order for the house which is hereby receiving 'zoning clearance' to be lawful. No building permit may be issued if the applicant abandons or discontinues implementation of the farm plan applicable hereto."

MC 10-99 was appealed to the Board of Commissioners. The county's final decision was Board Order No. 00-022, dated March 2, 2000. Board Order 00-022 affirmed MC 10-99, including the condition above. The Commissioners declined to set a specific date after which the approval would expire, but made continued implementation of the FMP a requirement for building permit approval.

The county amended its code, effective in January 2001. It adopted Chapter 37 of the Code, Administration and Procedures. MCC 37.0750 provided – and is still effective today – that, with some exceptions, land use decisions issued before January 1, 2001 would expire January 1, 2003, unless "a different timeframe was specifically included in

the decision."

Applicant and appellant Drew Bledsoe purchased the subject property in April 2001. In 2004, Mr. Bledsoe, his representative, and county staff met to discuss the status of the development approval for the parcel. Staff informed Mr. Bledose that he would need to seek a determination of whether the FMP was being implemented on the property. Mr. Bledsoe filed his application on December 9, 2004.

On March 16, 2005 the planning director denied Mr. Bledsoe's application. The director found that the record did not contain evidence that the FMP had been implemented as required by MC 10-99 and Board Order No. 00-022. The director construed MCC 37.0750 to provide no exemption to these approvals, holding that they did not specifically include a different timeframe for implementation of the FMP. Consequently, the director determined that the dwelling approvals for the subject site had expired on January 1, 2003 pursuant to MCC 37.0750. Further, the director denied Mr. Bledsoe's claim of vested rights to build the dwelling, finding no evidence of substantial expenditures toward its construction.

Mr. Bledsoe appealed the director's determination, specifying 11 grounds for the appeal.

**B. <u>Condition of the Christmas Tree Farm.</u>**

Mr. Bledsoe submitted written testimony for the appeal record that had not been available to the county when the director made her determination. In addition, several people attending the public hearing submitted significant oral testimony on Mr. Bledsoe's behalf. Among those submitting written and oral testimony were attorney Dorothy Cofield; certified arborist Keith Jehnke, of AKS Engineering & Forestry; and Christmas tree farm manager Michael W. Stone, of Best in the Nation of Oregon (BTN).

Mr. Jehnke submitted a written report, "Bledsoe Skyline Parcel Tree Farm Report," based on the FMP, his personal observations at the site, his expertise and experience, Michael Stone's affidavit regarding past management practices, and information from the Oregon State University Christmas Tree Extension Agent for Clackamas County. Mr. Jehnke's oral testimony touched upon the major points of the report, and answered questions from the hearings officer.

These are his observations: Noble fir trees have been planted on the parcel according to the plan. The trees are healthy and growing; they now range from 4-8 feet tall, and some will be ready for harvest, and will be marketable this year. The trees showed evidence of culturing to produce marketable Christmas trees, including evidence of weed control, basal pruning, and sheared branches and tips. He did not see evidence of certain management activities, such as spraying for aphids, but neither did he see evidence that there had been aphid infestation that would have necessitated spraying.

He verified with the OSU Extension Agent that if no management had occurred, approximately 13% to 20% of the trees would show deformities. With active management, approximately 2% of the trees would be defective. Two percent of the trees

on the Bledsoe property showed evidence of deformation from lack of tip shearing, top work and bug control. Four percent of trees in his sample showed other "defect issues." A total of 6% unmarketable trees is less than would be expected if the tree plantation had not been managed. These observations were consistent with and supported by Mr. Stone's testimony of work on the plantation that BTN had done over the past few years.

Mr. Jehnke concluded that trees are "healthy and thriving." He determined that "the 1989 Farm Management Plan has been implemented on the Bledsoe noble fir Christmas tree farm, in a manner consistent with the 1989 Farm Management Plan." He concluded that the wholesale value of the trees, when harvested, would be $83,000. If sold directly to consumers through a U-cut operation, the trees would be worth approximately $200,000.

No evidence in the record contradicts that presented by Mr. Jehnke. I find him to have been a credible witness. His specific observations and expert conclusions are substantial evidence that is persuasive and relevant to issues regarding implementation of the FMP.

## III. INTERPRETATION OF CRITERIA; APPLICATION OF THE EVIDENCE TO THE APPEAL ISSUES; CONCLUSIONS OF LAW.

### A. Implementation of the Farm Management Plan.

The county does not appear to dispute the evidence offered by Mr. Jehnke and Mr. Stone. The appellant does not dispute that neither he nor his predecessor, Western States, has built a dwelling on the property. The parties differ in that they assign different legal significance to these facts.

The director points out that MC 10-99 and Board Order No. 00-022 were both issued in 2000, and the hearings officer found in MC 10-99, that by January 2000, Western States had completed implementation of two years' worth of tasks from the FMP. By mid-2005, then, the implementation of the FMP should be at about year 7 ½. The FMP was premised on the notion that a dwelling would be necessary for proper farm management during year three of the plan – four years ago. The director concludes that the FMP has not been implemented or the house would have been constructed by now. Because the FMP is not implemented, the approvals expired on January 1, 2003, two years after adoption of MCC 37.0750.

The appellant views the FMP as a plan to achieve a general objective, which is to create a commercially viable Noble fir Christmas tree farm. In part, the FMP is a cost projection for accomplishing this result. Not every task listed in the plan must be performed strictly according to schedule, or even at all, if it is not necessary. Rather, the plan should be implemented by performance of management activities when appropriate. The applicant would apply this principle to construction of the house, in addition to activities like fertilizing. The applicant contends that the evidence demonstrates substantial compliance with the FMP, because the tree farm established on the property is healthy and thriving, and is producing high-quality, marketable trees as a commercially viable farm enterprise.

In T2-04-089, dated May 12, 2005, Hearings Officer Chambers considered a parcel that had received the same approvals as the subject property in this proceeding, was managed according to a 10-year FMP that anticipated dwelling construction in the third year, and was also governed by Board Order 00-022. The owner had sought a director's determination that it was entitled to approval of a building permit in accordance with prior approvals, and the director had denied the application for the same reasons as in this proceeding. Mr. Jehnke, Mr. Stone and others provided evidence regarding the implementation of the FMP in T2-04-089.

With regard to implementation of the FMP, Ms. Chambers found as follows:

> "There is substantial evidence of compliance with the farm management plan.
>
> "The County decision in this matter in part involved a finding that because the home was not established in the third year of the farm management plan, the farm management plan has not been implemented. However, I find that finding inconsistent with the decision of the Board in Order No. 00-022.
>
> "In determining whether an appropriate level of implementation has occurred, the County should be looking at the farm use of the land. ***In order to receive a building permit, the applicant must show that the farm activities have been carried on. The County has turned this requirement around 180 [degrees], and found that because the applicant had not constructed a home sooner, it had failed to carry out the necessary farm activities on the land.***" (Emphasis added.)

Ms. Chambers' analysis precisely describes the flaw in the director's decision on this case. The purpose of Statewide Planning Goal 3, related statutory provisions in ORS Chapter 215, and implementing provisions in the county code is to further the preservation of farmland and the enterprise of commercial farming in the exclusive farm use zones. Therefore, prior to 1993, the state and the county permitted construction of a dwelling in conjunction with farm use, if an appropriate farm management plan demonstrated that the property was - or could be - in farm use. In Board Order No. 00-022, the county held that the approved farm management plan for the Bledsoe parcel must be implemented in order for a building permit to issue. The time to challenge that holding is long past. Farm management justifies the dwelling, not the reverse.

Evidence in this case is clear that implementation of the FMP continues on the appellant's property, which is becoming a commercially viable Christmas tree plantation. The director's decision is incorrect in concluding that the FMP for the Bledsoe property has not been implemented. That portion of the appeal is sustained, and that portion of the director's decision is reversed.

## B. Expiration of Board Order No. 00-022 in Accordance With MCC 37.0750.

The director also determined that the dwelling approvals issued by the county for the subject parcel had expired on January 1, 2003. MCC 37.0750. The appellant contended that neither PRE 23-89 nor Board Order No. 00-022 had set a date by which implementation of the FMP was required, as a result of which, he had a perpetual right to establish a dwelling pursuant to those approvals. The appellant also reasoned that perpetuity was a "different timeframe" included in the decision, so that the dwelling approval was exempted from the expiration provision of MCC 37.0750.

Both the county and the appellant appeared to agree that MCC 37.0750 does not apply to a land use approval that is being implemented. That is correct, and is the case in this proceeding. The FMP is being implemented. Additionally, approval of the FMP can be viewed as specifically including a different timeframe: by its terms, the FMP is to last ten years. This is year eight.

This conclusion answers the contentions of both parties. The dwelling approval set forth in Board Order No. 00-022 has not expired, and that holding is reversed. The appellant's right to establish a dwelling is not, however, perpetual. Board Order No. 00-022 held that the dwelling could be established in conjunction with the FMP. If the FMP is abandoned, or if activities pursuant to the FMP are discontinued, no building permit may be issued under Board Order 00-022. This condition could not operate to divest the appellant of an entitlement that is perpetual in nature. The condition is no longer subject to appeal, and it cannot be collaterally attacked in this proceeding. The land use approval to establish a dwelling on appellant's land has not expired, and it is not perpetual. It remains valid as long as the FMP is implemented, and until January 2008.

## C. Other Grounds for Appeal.

Appellant's grounds for appeal numbers 7, 8, 9, and 11 have all been addressed above.

Appeal grounds 1 and 2 assert that the planning director should have found that a vested right to a dwelling had been established because of substantial expenditures made on the tree farm, the purchase price of the property, and the development and maintenance of the tree farm. The director was correct in finding that the appellant did not have a vested right to a building permit on the subject site. County counsel Sandra Duffy argued that case law governing vested rights indicates that the nature and relative amounts of expenditures on the property are key to a finding regarding vested rights. Expenditures related to dwelling construction, those for the well, have been insubstantial compared to other expenditures on the tree farm. No actual construction of the house has begun. The appellant has no vested right to a building permit.

Appeal points 3, 4, and 5 all contend that the county is estopped from denying the applicant a building permit. Number 3 states that Board Order 00-022 misled the property owner into believing that he has a perpetual right to a building permit. I view the Board's Order differently. The order set forth provisions indicating that the dwelling approval might not be effective in the future, and that later action by the county would be

necessary to determine whether the FMP had been implemented. This order could not have misled a reasonable person into believing he had a perpetual entitlement. For the reasons in Ms. Duffy's testimony, the county is not estopped to deny a building permit.

Appeal grounds number 6 states that the county's notice that it contemplated adopting MCC 37.0750 was inadequate under Measure 56 (ORS 215.503). My conclusion that MCC 37.0750 is not applicable in this matter makes discussion of this argument unnecessary.

Appeal grounds number 10 asserts that the director erred by requiring a Type II proceeding based on the filing of a complaint that the FMP was not being implemented on the property. County staff explain that the complaint did not form the basis for the Type II proceeding. The appellant had sought a planning director's determination that involved matters of code interpretation, review and construction of past decisions, and collecting and evaluating evidence. For the planning director's determination, the Type II process was appropriate.

## IV. CONCLUSION.

The Planning Director's decision is reversed. The zoning clearance for a dwelling issued under BOC Order No. 00-022 has not expired, and substantial evidence in the record demonstrates that the farm management plan is being implemented as required. Based upon the applicant's submittals and statements in the record, and subject to the conditions of approval that follow, the applicant is entitled to zoning approval and sign-off on a building permit review request.

## CONDITIONS OF APPROVAL:

These conditions are necessary to ensure that the approval criteria for this land use permit are satisfied and that the assumptions upon which it is based, including the findings and conclusions in this decision, are valid.

1. **The applicant or his successors must continue to follow the farm management plan approved in PRE 23-89. No building permit may be issued if the applicant or his successors abandon or discontinue implementing the farm management plan.**

2. **No building permit may be issued pursuant to this decision and the approval granted under PRE 23-89 and Board of Commissioners Order No. 00-022 after termination of the farm management plan on January 11, 2008.**

**Notice to the Morgtagee, Lien Holder, Vendor, or Seller: ORS Chapter 215 requires that if you receive this notice, it must be promptly forwarded to the purchaser or mortagor.**

Dated: June 3, 2005

Christine M. Cook,
Multnomah County Hearings Officer